

1 Marie Fiala (State Bar No. 79676)  
2 Russell P. Cohen (State Bar No. 213105)  
3 HELLER EHRMAN LLP  
4 333 Bush Street  
5 San Francisco, CA 94104-2878  
Telephone: (415) 772-6000  
Facsimile: (415) 772-6268  
Email: [Marie.Fiala@hellerehrman.com](mailto:Marie.Fiala@hellerehrman.com)

6 Gary M. Kaplan (State Bar No. 155530)  
7 HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN  
8 A Professional Corporation  
9 Three Embarcadero Center, Seventh Floor  
10 San Francisco, CA 94111-4024  
Telephone (415) 434-1600  
Facsimile (415) 217-5910  
Email: [gmkaplan@howardrice.com](mailto:gmkaplan@howardrice.com)

11 Attorneys for Defendant PACIFIC GAS & ELECTRIC COMPANY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

PUBLIC UTILITY DISTRICT NO. 2 OF  
GRANT COUNTY, WASHINGTON,

Case No.: C 07-03243 JSW

## Chapter 11 Case

Bankr. Case No. 01-30923 DM

18 Plaintiff,

19 ||

**DEFENDANT PACIFIC GAS AND  
ELECTRIC COMPANY'S  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR (I) WITHDRAWAL OF  
REFERENCE OF PROOF OF CLAIM  
AND (II) TRANSFER OF VENUE  
THEREOF**

2020-2021 Catalog | 103

20 | PACIFIC

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

Date: October 12, 2007

Time: 9:00 a.m.

Courtroom: 2, 17th Floor

Judge: Hon. Jeffrey S. White

## **TABLE OF CONTENTS**

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF FACTS.....	3
A.	The PX and ISO Markets in 2000 and 2001.....	3
B.	Power Prices Skyrocketed During the California Energy Crisis.....	3
C.	FERC Re-Set Prices in the PX and ISO Markets.....	4
D.	PG&E Filed for Bankruptcy.....	6
E.	The Ninth Circuit Opinion in <i>Bonneville Power Administration v. FERC</i> .....	7
F.	PG&E and Others Sought Relief Against Grant and Other Governmental Sellers in Court.....	8
G.	Grant Resurrects Its Lawsuit Against the ISO and Others in Washington.....	9
IV.	ARGUMENT .....	10
A.	Because the Confirmed Plan of Reorganization Does Not Allow Grant to Adjudicate Its Claim Outside of the Bankruptcy Court, Grant's Motion for Withdrawal of the Reference Must Be Denied. ....	10
B.	Grant County Fails to Meet the Legal Standards for Withdrawal of the Reference. ....	13
1.	Efficiency Counsels Against Withdrawal of Grant's Claim. ....	14
2.	Grant Offers No Other Justification to Support Withdrawal. ....	17
C.	The Request to Transfer Venue to the Eastern District of Washington Should Be Denied. ....	18
V.	CONCLUSION .....	21

**TABLE OF AUTHORITIES****Cases**

3	<i>Bank Midwest, N.A. v. Cyberco Holdings, Inc.</i> , 2005 U.S. Dist. LEXIS 25834 (W.D. Mich. Oct. 20, 2005) .....	16
5	<i>Big Rivers Electric Corp. v. Green River Coal Co., Inc.</i> , 182 B.R. 751 (W.D. Ky. 1995) .....	16
7	<i>Bonneville Power Administration v. FERC</i> , 422 F.3d 908 (9th Cir. 2005).....	passim
9	<i>Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.</i> , 181 F. Supp. 2d 1111 (E.D. Cal. 2001).....	15
11	<i>California ex rel. Lockyer v. Dynegy, Inc.</i> , 375 F.3d 831 (9th Cir. 2004).....	3
13	<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958) .....	18
15	<i>CoreStates Bank, N.A. v. Huls Am., Inc.</i> , 176 F.3d 187 (3d Cir. 1999) .....	10
17	<i>First Union Commercial Corp. v. Nelson, Mullins, Riley &amp; Scarborough</i> , 81 F.3d 1310 (4th Cir. 1996).....	10
18	<i>Hatzel &amp; Buehler, Inc. v. Central Hudson Gas &amp; Elec. Corp.</i> , 106 B.R. 367 (D. Del 1989) .....	13
20	<i>Heritage Hotel Ltd. Partnership I v. Valley Bank of Nevada</i> , 160 B.R. 374 (9th Cir. BAP 1993), <i>aff'd</i> , 59 F.3d 175 (9th Cir. 1995).....	10
22	<i>Holstein v. Brill</i> , 987 F.2d 1268 (7th Cir. 1993).....	12
24	<i>In re Am. Int'l Airways, Inc.</i> , 66 B.R. 642 (Bankr. E.D. Pa. 1986).....	20
26	<i>In re Castle Industries, Inc.</i> , 147 B.R. 941 (Bankr. E.D. Ark. 1992).....	12
27	<i>In re Cinematronics, Inc.</i> , 916 F.2d 1444 (9th Cir. 1990).....	14
28		

1	<i>In re County of Orange</i> , 219 B.R. 543 (Bankr. C.D. Cal. 1997) .....	10
2		
3	<i>In re DeLorean Motor Co.</i> , 49 B.R. 900 (E.D. Mich. 1985) .....	13-14
4		
5	<i>In re Diamond Mortg. Corp. of Illinois</i> , 105 B.R. 876 (Bankr. N.D. Ill. 1989) .....	12
6		
7	<i>In re Enviro-Scope Corp.</i> , 57 B.R. 1005 (E.D. Pa. 1985) .....	16
8		
9	<i>In re Harris Pine Mills</i> , 44 F.3d 1431 (9th Cir. 1995) .....	14
10		
11	<i>In re Holmes</i> , 306 B.R. 11 (Bankr. M.D. Ga. 2004) .....	21
12		
13	<i>In re Logan Place Properties, Ltd.</i> , 327 B.R. 811 (Bankr. S.D. Tex 2005) .....	12
14		
15	<i>In re Onco Invest. Co.</i> , 320 B.R. 577 (Bankr. D. Del. 2005) .....	19, 21
16		
17	<i>In Re Onyx Motor Car Corp.</i> , 116 B.R. 89 (S.D. Ohio 1990) .....	13
18		
19	<i>In re Orion Pictures Corp.</i> , 4 F.3d 1095 (2d Cir. 1993) .....	14
20		
21	<i>In re Planet Hollywood Intern.</i> , 274 B.R. 391 (Bankr. D. Del. 2001) .....	12
22		
23	<i>In re Rainbow Trust, Business Trust</i> , 200 B.R. 785 (Bankr. D. Vt. 1996) .....	10
24		
25	<i>In re Rickel &amp; Associates, Inc.</i> , 260 B.R. 673 (Bankr. S.D.N.Y. 2001) .....	12
26		
27	<i>In re Sevko, Inc.</i> , 143 B.R. 114 (N.D. Ill. 1992) .....	16
28		
	<i>In re Sun West Distributors, Inc.</i> , 69 B.R. 861 (S.D. Cal. 1987) .....	14
	<i>In re TIG Ins. Co.</i> , 264 B.R. 661 (Bankr. C.D. Cal. 2001) .....	19

1	<i>In re U.S. Airways Group, Inc.</i> , 296 B.R. 673 (E.D. Va. 2003).....	13
2		
3	<i>In re Vencor, Inc.</i> , 284 B.R. 79 (Bankr. D. Del. 2001) .....	12
4		
5	<i>In re Wedtech Corp.</i> , 81 B.R. 237 (S.D.N.Y. 1987).....	16
6		
7	<i>In re Windsor Comm. Group, Inc.</i> , 53 B.R. 293 (Bankr. E.D. Pa. 1985).....	20-21
8		
9	<i>Lu v. Dryclean-U.S.A. of California, Inc.</i> , 11 Cal. App. 4th 1490 (1992).....	18, 19
10		
11	<i>McGill v. Hill</i> , 644 P.2d 680 (Wash. Ct. App. Div. 1 1982) .....	20
12		
13	<i>Miller v. United States</i> , 363 F.3d 999 (9th Cir. 2004).....	10
14		
15	<i>Oliner v. Kontrabecki</i> , 2006 U.S. Dist. LEXIS 93190 (N.D. Cal. Dec. 12, 2006) .....	15
16		
17	<i>Public Utils. Comm'n v. FERC</i> , 462 F.3d 1027 (9th Cir. 2006).....	3, 4, 5, 6
18		
19	<i>Security Farms v. Int'l Bhd. of Teamsters</i> , 124 F.3d 999 (9th Cir. 1997).....	14, 15, 17
20		
21	<i>Smith, Valentino, &amp; Smith, Inc. v. Superior Court</i> , 17 Cal. 3d 491 (1976).....	18, 19
22		
23	<i>United States Trustee v. CF&amp;I Fabricators of Utah, Inc. (In re CF&amp;I Fabricators of Utah, Inc.)</i> , 150 F.3d 1233 (10th Cir. 1998).....	12
24		
25	<i>United States v. Kaplan</i> , 146 B.R. 500 (D. Mass 1992).....	13
26		
27	<i>United States v. Star Route Box 1328</i> , 137 B.R. 802 (Bankr. D. Or. 1992) .....	15
28		

1	<b>Statutes</b>
2	11 U.S.C. §1101(2).....13
3	11 U.S.C. § 1127(b).....11-12
4	11 U.S.C. § 1141 .....10, 11
5	16 U.S.C. §§ 791a, <i>et seq.</i> .....3
6	28 U.S.C. § 157 .....14
7	
8	<b>Miscellaneous</b>
9	10 <i>Collier on Bankruptcy</i>
10	¶ 7087.02 (15th ed. rev. 2003) .....19
11	15 C. Wright, A. Miller, & E. Cooper, <i>Fed. Prac. &amp; Proc.</i>
12	§§ 3851 and 3853 (2d ed. 1986 & Supp. 2003) .....21
13	Restatement (Second) of Conflicts of Laws
14	§ 187 (1971) .....20
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

1           **I. INTRODUCTION**

2           This motion by Public Utility District No. 2 of Grant County, Washington (“Grant”) arises  
3 out of Pacific Gas & Electric Company’s (“PG&E”) bankruptcy proceeding filed in the aftermath  
4 of the 2000-2001 California Energy Crisis. The motion is both procedurally improper and  
5 substantively unjustified.

6           The California Energy Crisis resulted from a combination of market dysfunction and active  
7 manipulation by some sellers that caused electricity prices in the California wholesale electricity  
8 markets to skyrocket during the period May 2000 to June, 2001. PG&E, which was required by  
9 law to purchase electricity in the dysfunctional California markets to serve its customers, paid out  
10 billions of dollars more to purchase wholesale power than it recovered in rates from its retail power  
11 sales. As a result, PG&E amassed crippling debt and was forced on April 6, 2001 to file for  
12 bankruptcy protection. Grant filed a claim in PG&E’s bankruptcy proceeding for amounts  
13 allegedly due for power it sold at inflated prices to PG&E, through the California markets, during  
14 the Energy Crisis (the “Grant Claim”). The Bankruptcy Court eventually confirmed a Plan of  
15 Reorganization that, *inter alia*, referred the Grant Claim to the Federal Energy Regulatory  
16 Commission (“FERC”) for disposition. Now, three years later, Grant asks for the withdrawal of the  
17 reference of its claim from the Bankruptcy Court, and transfer to the District Court for the Eastern  
18 District of Washington, where Grant has instituted a lawsuit against two other California utilities  
19 seeking to recover payment for power sales it made during the Energy Crisis.

20           Grant’s motion is far too late, and also improper. The order confirming PG&E’s Plan of  
21 Reorganization (“Plan”) is a final judgment of the Bankruptcy Court with res judicata effect. The  
22 Plan bars Grant from adjudicating its claim in any forum other than as was prescribed therein, to  
23 wit, at FERC. Modification of the Plan is necessary before Grant may pursue the remedy it now  
24 requests from this Court. But Grant, as a creditor, is not entitled to seek modification or otherwise  
25 rewrite the provisions of the Plan, which has been substantially consummated. For this reason,  
26 Grant’s motion should be denied without any need for consideration of the remaining issues raised  
27 therein.

1       In any event, Grant has not (and cannot) show that the requested withdrawal of the reference  
 2 is justified. Leaving for FERC the determination of the amounts owed by or to Grant, as the  
 3 Bankruptcy Court required pursuant to its confirmation order, is not only mandated by the Plan, but  
 4 also is far more efficient. FERC has determined that the prices that prevailed during the Energy  
 5 Crisis were unjust, unreasonable and unlawful. For the past several years FERC has been engaged  
 6 in the enormous undertaking of re-calculating the price for each of the millions of transactions,  
 7 including Grant's sales to PG&E, that took place in the California markets during the Energy Crisis.  
 8 All of the relevant parties, including Grant, are participants in that process. FERC will continue  
 9 and conclude its calculations whether or not the Grant Claim is withdrawn. In light of that ongoing  
 10 proceeding, withdrawal of the reference would only create unnecessary duplication of effort and the  
 11 attendant risk of inconsistent outcomes.

12       Contrary to Grant's argument, FERC has not been deprived of the authority to calculate the  
 13 California market participants' refund liabilities by the Ninth Circuit's recent opinion in *Bonneville*  
 14 *Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005). The only function FERC lacks  
 15 jurisdiction to undertake in light of the *Bonneville* holding is enforcement of its refund order against  
 16 governmental entities such as Grant — that is, compelling a governmental entity to pay the refunds  
 17 it owes to purchasers as the result of FERC's revision of prices. Under *Bonneville*, compelling  
 18 payment of the refund obligation must be pursued in a court via a contract action if the  
 19 governmental entity chooses not to honor its contractual commitment to charge no more than the  
 20 FERC-approved price for power. *Bonneville* provides no excuse for departing from the provisions  
 21 of the Plan even if this motion were procedurally proper, which it is not.

22

23 **II. STATEMENT OF ISSUES**

24       Should this Court withdraw the reference of the Grant Claim from California Bankruptcy  
 25 Court to this Court and, then, transfer that claim to the District Court for the Eastern District of  
 26 Washington?

27

28

1 **III. STATEMENT OF FACTS**

2 PG&E is an investor-owned utility that is obligated by law to supply electrical power to  
 3 businesses and residents in Northern and Central California. In 2000-2001, the time period relevant  
 4 here, PG&E was required by statute to purchase most of its power supply through auction markets  
 5 operated by the California Power Exchange (“PX”) and the California Independent System  
 6 Operator (“ISO”), both non-profit corporations organized under California law. *Public Utils.*  
 7 *Comm’n v. FERC*, 462 F.3d 1027, 1037-39 (9th Cir. 2006) (“CPUC”).

8 **A. The PX and ISO Markets in 2000 and 2001.**

9 The PX was created to function as California’s principal power market. *CPUC*, 462 F.3d at  
 10 1037-38. It conducted daily auctions in which buyers purchased power for the following day, and  
 11 also operated hourly auctions to allow buyers to make any necessary adjustments to their day-ahead  
 12 purchases. *Id.* The ISO’s main role was to safely and reliably operate California’s transmission  
 13 grid. To meet this obligation, the ISO operated its own wholesale power markets, where it could  
 14 buy, in real time, the electric power it needed to perform this vital function. *Id.* at 1038-39.

15 All sales and purchases of power in the PX and ISO markets were required to be made  
 16 pursuant to tariffs filed with and approved by FERC. *Id.* at 1039-39. The PX and ISO Tariffs are  
 17 the legal equivalent of federal regulations. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d  
 18 831, 841 (9th Cir. 2004). They specify in detail the rules of the road for the California markets,  
 19 prescribing the functions of the markets themselves and the obligations owed by market  
 20 participants. Important for present purposes, the Tariffs contain the formulas used to establish  
 21 prices for all purchases and sales in those markets, allow FERC to review and amend market prices  
 22 pursuant to its exclusive jurisdiction under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, and  
 23 require sellers to charge no more than the FERC-approved prices. Under the Tariffs, in general, all  
 24 sellers during a particular time period received the same price—called a “market clearing price”—  
 25 for all transactions in a particular market. *CPUC*, 462 F.3d at 1038-39.

26 **B. Power Prices Skyrocketed During the California Energy Crisis.**

27 Beginning in May 2000, the prices demanded by sellers in the PX and ISO markets shot up  
 28 to unprecedeted levels and stayed there for the next year, generating windfall profits for all sellers.

1 *Id.* at 1039. The power crisis had severe negative effects on the stability and financial integrity of  
 2 PG&E, and ultimately imposed billions of dollars in additional costs on ratepayers, including  
 3 business and residential customers throughout the State. *Id.* at 1042-43.

4 In order to obtain sufficient electric power to maintain the reliability of California's electric  
 5 grid during the crisis period, the ISO at times was required to find and buy electric power through  
 6 mechanisms other than its single-price auction. *Id.* at 1051. Such emergency power was known as  
 7 "out-of-market" or "OOM" power, and was procured by the ISO under the provisions of the ISO  
 8 Tariff. *Id.* at 1051-53. Suppliers of OOM power regularly demanded extraordinarily high prices  
 9 for such sales and got them, because the ISO had no choice but to buy energy to ensure grid  
 10 reliability. *Id.* at 1052. The ISO charged market participants, including PG&E, for the power it  
 11 bought through OOM sales.

12 Grant was one of the sellers from which the ISO purchased OOM power in November and  
 13 December 2000, at the height of the power crisis. Complaint ¶ 3 (McAllen Decl.<sup>1</sup> Ex. D). *See also*  
 14 *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,218 at ¶¶ 66-69 (2004) ("November 23, 2004 Order")  
 15 (Grant RJN,<sup>2</sup> Ex. 6). As a result, Grant earned windfall profits on those sales; the price that it  
 16 charged would later be determined to be unjust, unreasonable and unlawful.

17 **C. FERC Re-Set Prices in the PX and ISO Markets.**

18 In August 2000, at the request of PG&E and other buyers, FERC commenced a broad  
 19 investigation into sellers' rates in the PX and ISO markets. *CPUC*, 462 F.3d at 1041. Based on  
 20 that investigation and the associated proceedings (collectively the "Refund Proceeding"),<sup>3</sup> FERC  
 21 concluded on July 25, 2001, that sellers in the PX and ISO markets had sold electric power at  
 22

---

23 <sup>1</sup> References to "McAllen Decl." are to the Declaration of Peter G. McAllen filed by Grant  
 24 in Support of its Motion on August 3, 2007 (Docket No. 7).

25 <sup>2</sup> References to "Grant RJN" are to the Request for Judicial Notice filed by Grant in  
 26 Support of its Motion on August 3, 2007 (Docket No. 9).

27 <sup>3</sup> Grant intervened as a party and gained full participatory rights in the Refund Proceeding,  
 28 including the ability to apply for rehearing and to appeal from any adverse FERC ruling. Motion to  
 Intervene Out of Time of Public Utility District No. 2 of Grant County, Washington, *San Diego*  
*Gas & Elec. Co.*, FERC No. EL00-95-004, *et al.* (Aug. 10, 2001) (PG&E Request for Judicial  
 Notice ("PG&E RJN" Ex. 1)).

1 unjust, unreasonable and unlawful rates, and that the rates should be corrected for the period  
 2 October 2, 2000, to June 20, 2001 (the “Refund Period”). *San Diego Gas & Elec. Co.*, 96 FERC  
 3 ¶ 61,120 (2001) (“July 25, 2001 Order”) (Grant RJN, Ex. 1). *See also CPUC*, 462 F.3d at 1043.  
 4 FERC adopted a methodology to recalculate the maximum competitive market prices that would  
 5 have existed in the PX and ISO markets if sellers had charged just and reasonable rates, *i.e.*, the  
 6 “Mitigated Market Clearing Price” or “MMCP.” July 25, 2001 Order at pp. 61,516-19 (Grant RJN,  
 7 Ex. 1); *CPUC*, 462 F.3d at 1043. FERC ordered the PX and ISO to apply the MMCP to sales  
 8 during the Refund Period to recalculate the charges that all sellers should have received in place of  
 9 the previous unlawful prices. Prices that exceeded the MMCP were unlawful and subject to refund.  
 10 *CPUC*, 462 F.3d at 1043.

11 FERC also held that the ISO Tariff applied with full force to the OOM sales made by Grant  
 12 and others to the ISO. July 25, 2001 Order, 96 FERC at 61,515 (Grant RJN, Ex. 1). Such  
 13 purchases were authorized by the ISO Tariff, were made to maintain transmission system reliability  
 14 during times when the stability of the grid was threatened, and were as much a part of the FERC  
 15 regulated market as the auction market transactions. As FERC noted, such purchases “are  
 16 contemplated in the ISO Tariff as a backstop to the ISO’s auction markets.” *San Diego Gas &*  
 17 *Elec. Co.*, *et al.*, Docket Nos. EL00-95-001, *et al.*, 97 FERC ¶ 61,275 at 62,195 (2001) (Grant RJN,  
 18 Ex. 2). The Ninth Circuit confirmed that conclusion. *CPUC*, 462 F.3d at 1051-53 (affirming  
 19 FERC’s conclusion that OOM sales were a backstop to the ISO auction market and were subject to  
 20 mitigation).

21 Grant sought rehearing of the July 25, 2001 Order, but FERC rejected Grant’s arguments for  
 22 reversal in a series of orders culminating in a final decision on November 23, 2004. *See, e.g.*, *San*  
 23 *Diego Gas & Elec. Co.*, Docket Nos. EL00-95-081 and EL00-98-069, Request for Rehearing of  
 24 Public Utility District No. 2 of Grant County, Washington (filed Apr. 24, 2003) (Grant RJN, Ex. 4);  
 25 November 23, 2004 Order at ¶¶ 66-69 (Grant RJN, Ex. 6). FERC concluded: “The Commission is  
 26 not persuaded . . . that the transactions at issue are anything other than OOM transactions made  
 27 under the CAISO Tariff and therefore jurisdictional. November 23, 2004 Order at ¶ 69 (Grant RJN,  
 28 Ex. 6). As a result of that order, Grant was entitled to receive only the FERC-corrected price for its

1 OOM sales to the ISO, not its full original price. Grant sought review of the November 23, 2004  
 2 Order by petition to the Ninth Circuit Court of Appeals. McAllen Decl. ¶ 3. That petition is still  
 3 pending.

4 **D. PG&E Filed for Bankruptcy.**

5 PG&E was not permitted to immediately pass through to its customers the exorbitant costs  
 6 of buying electric power during the Energy Crisis. As a result, it amassed crippling debt to finance  
 7 those costs. PG&E's credit ratings fell below investment grade, making it ineligible to buy power  
 8 through the PX and ISO. On April 6, 2001, PG&E filed a voluntary petition for bankruptcy under  
 9 Chapter 11 in the Bankruptcy Court for the Northern District of California. McAllen Decl. ¶ 8;  
 10 CPUC, 462 F.3d at 1042. On August 31, 2001, Grant filed a proof of claim in that case for the  
 11 amounts allegedly due for the electricity it had sold to the ISO on behalf of PG&E, but for which it  
 12 alleged it had not yet been paid (the "Grant Claim"). McAllen Decl. ¶ 8. *See also* Proof of Claim  
 13 (McAllen Decl., Ex. G).

14 The Bankruptcy Court confirmed a Plan of Reorganization for PG&E on December 22,  
 15 2003 (the "Plan"). McAllen Decl. ¶ 8; Plan (McAllen Decl., Ex. H); Confirmation Order (PG&E  
 16 RJN, Ex. 4). The Plan classified the Grant Claim and several dozen similarly situated claims as  
 17 "Class 6 – ISO, PX, and Generator Claims"<sup>4</sup> and referred them to FERC for liquidation, *i.e.*, a  
 18 determination of the amount actually owed by PG&E to each claimant. *Id.* § 4.15(c).

19 As of the date hereof, all ISO, PX and Generator Claims are Disputed. The Debtor agrees  
 20 that for purposes of determining the amount of Allowed ISO, PX and Generator claims that  
 21 are not resolved consensually by settlement, the Debtor will prosecute the FERC Refund  
 22 Proceedings only before the FERC or any Court to which an appeal from the FERC order  
 23 may be taken, and will not attempt to obtain a determination of such matters before the  
 24 Bankruptcy Court . . . .

25 *Id.*

26 A Disputed ISO, PX and Generator Claim shall become an Allowed Claim on the date  
 27 designated by FERC when payments are to be made on account of ISO, PX and Generator  
 28 Claims, pursuant to an unstayed order in the FERC Refund Proceedings: provided, however,

---

26 <sup>4</sup> The Plan defines "ISO, PX, and Generator Claims" as "all Claims against [PG&E] arising  
 27 from amounts due to the ISO, PX and various power generators based on purchases of electricity or  
 28 ancillary services by [PG&E] in markets operated by the PX and the ISO." Plan § 1.1 (McAllen  
 Decl., Ex. H).

1 that if no date is designated in such order, a Disputed ISO, PX and Generator Claim shall  
 2 automatically become an Allowed Claim forty-five (45) days after the issuance of such  
 3 order, provided such order has not been stayed.

4 *Id.* § 5.4(g)(i). So, once FERC has liquidated the Class 6 Claims, they become “Allowed Claims,”  
 5 meaning that PG&E will pay those claims in accordance with the distribution procedures set forth  
 6 in the Plan. *Id.* §§ 4.1, 4.2, 4.15(a).

7 **E. The Ninth Circuit Opinion in *Bonneville Power Administration v. FERC*.**

8 While PG&E’s bankruptcy case proceeded, certain governmental sellers (cities, counties,  
 9 irrigation districts, states and a federal agency) mounted a challenge to FERC’s enforcement  
 10 authority over them. Those sellers filed a petition for review of FERC’s July 25, 2001 Order,  
 11 which had concluded that FERC had authority to compel *all* sellers in the PX and ISO markets to  
 12 pay refunds. *Bonneville*, 422 F.3d at 910. *The Bonneville petition did not raise the issue*  
 13 *presented in the pending appeal by Grant, i.e., whether Grant’s OOM sales are subject to the*  
 14 *terms of the ISO Tariff and thus to price mitigation.* Grant was not even a party to the *Bonneville*  
 15 petition.

16 The Ninth Circuit granted the petition on September 6, 2005. *Bonneville*, 422 F.3d at 911.  
 17 Specifically, the Ninth Circuit held that FERC lacked jurisdiction under the Federal Power Act to  
 18 compel governmental entities to pay refunds. *Id.* at 920. It “set aside FERC’s orders related to the  
 19 2000 and 2001 spot market to the extent the orders subject the governmental entities . . . to FERC’s  
 20 refund authority.” *Id.* at 911. The Ninth Circuit, however, did not set aside FERC’s determination  
 21 that the prices charged were unjust, unreasonable, and unlawful. Nor did it set aside the  
 22 methodology adopted by FERC to determine the maximum price that could be charged to  
 23 customers under the PX and ISO Tariffs during the Refund Period. In fact, the Ninth Circuit  
 24 recognized the broad continuing scope of FERC authority to re-set prices under those tariffs and  
 25 otherwise regulate the markets, and that such exercise of authority could indeed be enforced against  
 26 even governmental entities. *Id.* at 925-26.

27 As a condition of selling energy in the California markets, most sellers—including  
 28 governmental entities—had entered into contracts to abide by all terms of the PX and ISO Tariffs,  
 which governed the operations of those markets. Most sellers signed written contracts to that

1 effect; certain sellers, including Grant, are bound under an implied-in-fact contract by virtue of  
 2 having participated in the California markets and sold power under the relevant Tariffs. Those  
 3 Tariffs require sellers to charge no more than the FERC-approved price and to refund overcharges  
 4 if FERC corrected the prices at which they sold power.

5 In *Bonneville*, the Ninth Circuit noted specifically that market participants could, as an  
 6 alternative remedy, bring claims in court directly against governmental sellers to enforce the  
 7 contractual obligations created by the operative tariffs and related agreements. *Id.* at 925-26. The  
 8 Ninth Circuit observed that that the governmental sellers' agreements to abide by the PX and ISO  
 9 Tariffs "serves to demonstrate that the remedy, if any, may rest in a contract claim, not a refund  
 10 action. Such an approach is not novel . . ." *Id.*, citing *Alliant Energy, Inc. v. Neb. Pub. Power*  
 11 *Dist.*, Civ. No. 00-2139, 2001 WL 1640132 (D. Minn. Oct. 18, 2001), *aff'd*, 347 F.3d 1046 (8th Cir.  
 12 2003).

13 **F. PG&E and Others Sought Relief Against Grant and Other Governmental  
 14 Sellers in Court.**

15 Following *Bonneville*, PG&E, Southern California Edison ("SCE"), and San Diego Gas &  
 16 Electric Company ("SDG&E") (collectively, the "Utilities")<sup>5</sup> moved to enforce their private  
 17 remedies in court. In April 2007, the Utilities filed a breach of contract action in Los Angeles  
 18 Superior Court against Grant and other governmental sellers, seeking to recover refunds they owed  
 19 to the Utilities and ultimately California's ratepayers. *See PG&E et al. v. Arizona Elec. Power*  
 20 *Cooperative, Inc. et al.*, Case No. BC369141, Los Angeles Superior Court (filed Apr. 9, 2007) (the  
 21 "Los Angeles Action").

22 Grant attempts to distinguish itself from the other defendants in the Los Angeles Action  
 23 (MPA<sup>6</sup> at 11), but it is no different. All of the defendants sold power in the California markets  
 24 during the Energy Crisis. All of the defendants charged prices later determined to be unjust,  
 25 unreasonable, and unlawful by FERC. All of the defendants are contractually bound by the terms

26 <sup>5</sup> The California Electricity Oversight Board also joined as a plaintiff, on behalf of the State  
 27 of California in its oversight role to ensure the proper functioning of California's power markets.

28 <sup>6</sup> Reference to "MPA" are to the Memorandum of Points and Authorities filed by Grant in  
 Support of its Motion on August 3, 2007 (Docket No. 6).

1 of the PX and ISO Tariffs, including FERC's authority to mitigate prices and the requirement to  
 2 refund overcharges. Although Grant contends it is not subject to personal jurisdiction in California  
 3 (see, e.g., MPA at 21), the ISO Tariff—to which Grant's OOM sales are subject—expressly  
 4 provides that any lawsuit be brought in a California court. ISO Tariff § 20.7 (PG&E RJN, Ex. 2).

5 **G. Grant Resurrects Its Lawsuit Against the ISO and Others in Washington.**

6 The Los Angeles Action will determine Grant's contractual obligation and includes all the  
 7 parties necessary to that determination. Nonetheless, two months after that action was filed, Grant  
 8 moved to resurrect its own long dormant (and duplicative) lawsuit in the District Court for the  
 9 Eastern District of Washington against the ISO, SCE, and SDG&E (the "Washington Action").  
 10 Grant did not name PG&E as a defendant, as doing so would have run afoul of the anti-suit  
 11 injunction adopted by the California Bankruptcy Court. Plan §§ 9.5, 9.6 (McAllen Decl., Ex. H)  
 12 (prohibiting any party from commencing or continuing any action with respect to any claim that  
 13 arose prior to PG&E's bankruptcy). Grant initiated the Washington Action more than three years  
 14 ago, seeking payment of the *full* original price—that is, the unjust, unreasonable and unlawful  
 15 price—for its OOM sales during the Energy Crisis. Grant contends in that action that its sales did  
 16 not occur under the ISO Tariff—directly contrary to FERC's holding in the November 23, 2004  
 17 Order—and that its sales therefore are not subject to price mitigation. *See, e.g.*, Grant Cmplt.  
 18 ¶¶ 34-40 (McAllen Decl., Ex. D). Grant Cmplt. (Prayer for Relief ¶ 3) (McAllen Decl., Ex. D).

19 The Washington Action has been stayed at Grant's request for more than three years to  
 20 allow Grant to petition for review of FERC's November 23, 2004 Order. McAllen Decl. ¶ 3.  
 21 Although its petition for review is still pending, Grant recently moved, and the court agreed on July  
 22 26, 2007, to lift the stay in the Washington Action. Order Lifting Stay (McAllen Decl., Ex. F).  
 23 Grant, by this motion, hopes to withdraw, transfer, and consolidate its claim against PG&E with  
 24 that duplicative action.

25

26

27

28

1 **IV. ARGUMENT**2 **A. Because the Confirmed Plan of Reorganization Does Not Allow Grant to  
3 Adjudicate Its Claim Outside of the Bankruptcy Court, Grant's Motion for  
4 Withdrawal of the Reference Must Be Denied.**

5 Grant's request for withdrawal of the reference so that it can have its claim transferred for  
 6 resolution in the Washington Action is barred by PG&E's confirmed Plan of Reorganization. As an  
 7 initial matter, that Plan is a contract that is binding on all parties, including Grant. *Miller v. United*  
 8 *States*, 363 F.3d 999, 1004 (9th Cir. 2004) ("A Chapter 11 bankruptcy plan is essentially a contract  
 9 between the debtor and his creditors. . . ."); 11 U.S.C. § 1141(a) ("the provisions of a confirmed  
 10 plan bind the debtor. . . and any creditor"). Moreover, because it has been confirmed by the  
 11 Bankruptcy Court (see Confirmation Order (PG&E RJN, Ex. 4)) the Plan also has the full force and  
 12 effect of a final judgment. *First Union Commercial Corp. v. Nelson, Mullins, Riley &*  
 13 *Scarborough*, 81 F.3d 1310 (4th Cir. 1996). All disputes that were or could have been raised about  
 14 the confirmed Plan—emphatically including the treatment of any creditor's claim—are resolved by  
 15 the terms of the Plan and, the doctrine of *res judicata* bars any party—including Grant—from  
 16 rehashing them. *See Heritage Hotel Ltd. Partnership I v. Valley Bank of Nevada (In re Heritage*  
 17 *Hotel)*, 160 B.R. 374, 377 (9th Cir. BAP 1993), *aff'd*, 59 F.3d 175 (9th Cir. 1995); *In re County of*  
 18 *Orange*, 219 B.R. 543 (Bankr. C.D. Cal. 1997). Accordingly, Grant has only those rights that the  
 19 Plan gives it, and Grant may not expand those rights through this Motion. *CoreStates Bank, N.A. v.*  
 20 *Huls Am., Inc.*, 176 F.3d 187 (3d Cir. 1999); *In re Rainbow Trust, Business Trust*, 200 B.R. 785  
 21 (Bankr. D. Vt. 1996). The preclusive effect of a confirmed Plan applies with equal force to  
 22 procedures established by the Plan.

23 As detailed in Section III.D. above, the Plan expressly provides that the Grant Claim—along  
 24 with the other Class 6 Claims—shall be liquidated by FERC. Plan § 4.15(c) (McAllen Decl., Ex.  
 25 H). The Plan also precludes Grant from pursuing its claim against PG&E in any forum other than  
 26 what is provided for in the Plan. It states:

27 [E]xcept as otherwise expressly provided herein, the Confirmation Order or a  
 28 separate order of the Bankruptcy Court, all entities who have held, hold or may hold  
 Claims against or Equity Interests in [PG&E], are permanently enjoined, on and  
 after the Confirmation Date, from (a) commencing or continuing in any manner any  
 action or other proceeding of any kind with respect to any such Claim or Equity

1 Interest . . . . The injunction shall also enjoin all parties in interest, including,  
 2 without limitation, all entities who have held, hold or may hold Claims against or  
 3 Equity Interests in [PG&E], from taking any action in violation of the Confirmation  
 Order.

4 *Id.* §9.6. The order confirming the Plan contains substantially identical restrictions. Confirmation  
 5 Order ¶ 25 (PG&E RJN, Ex. 4). These provisions articulate the “discharge injunction” of Section  
 6 1141 of the Bankruptcy Code. 11 U.S.C. § 1141. As Grant itself expressly recognizes in its  
 7 Motion, “this discharge injunction prohibited Grant from directly naming [PG&E] as a defendant in  
 8 the Washington District Court proceeding . . . .” MPA at 10. Grant cannot circumvent these  
 9 injunctive provisions now by seeking to withdraw the reference of its claim in order to transfer  
 10 adjudication of its claim to the Washington Action.

11 Grant tries to avoid this absolute bar by asserting that it reserved the right to adjudicate its  
 12 claim in the Bankruptcy Court, as opposed to FERC. MPA at 10-11. But this argument fails. On  
 13 April 1, 2004, the Bankruptcy Court entered an order extending the time within which PG&E could  
 14 lodge certain limited objections to claims, after they had been liquidated by FERC. Extension  
 15 Order (McAllen Decl., Ex. K). Grant relies on the following provision of that Order: “This Order  
 16 is without prejudice to the right of Public Utility District #2 of Grant County (‘Grant County’) to  
 17 seek adjudication in [the Bankruptcy] Court, through appropriate noticed motion, of the allowance  
 18 of its Claim.” Extension Order at ¶13 (McAllen Decl., Ex. K). Grant specifically agreed to the  
 19 provisions of the Extension Order; Grant’s counsel (the same counsel appearing for Grant on the  
 20 present Motion) represented to the Bankruptcy Court at the March 5, 2004, hearing: “We have seen  
 21 the form of order and we are satisfied.” Hrg. Tr. at 40:17-40:18 (PG&E RJN, Ex. 6). But the  
 22 Extension Order, at most, reserved Grant’s right to seek liquidation of its claim *by the Bankruptcy*  
 23 *Court*; it did not give Grant the right to seek adjudication *in some other forum*, such as the  
 24 Washington District Court. Accordingly, the Extension Order does not help Grant.

25 Therefore, the confirmed Plan would have to be modified before Grant could seek to have  
 26 its claim adjudicated in a forum other than the Bankruptcy Court or FERC. Grant has not sought,  
 27 let alone obtained, such a modification. Nor could it. Only the proponent of a plan may modify it  
 28 after confirmation, and then, only if the plan has not been substantially consummated. 11 U.S.C.

1   § 1127(b).<sup>7</sup> The Plan itself contains similar restrictions: “[t]he Plan may be amended or modified  
 2 by the Proponents acting collectively at any time after the Confirmation Date and before substantial  
 3 consummation of the Plan.” Plan §11.11(a) (McAllen Decl., Ex. H). Neither condition has been  
 4 met here.

5       First, Grant is not the “proponent” of the Plan,<sup>8</sup> and is not otherwise a proper party to seek  
 6 amendment of the Plan. Courts have recognized that creditors—such as Grant—lack standing to  
 7 seek modification of a plan, even in light of changed circumstances. *E.g., In re Planet Hollywood*  
 8 *Intern.*, 274 B.R. 391, 400 (Bankr. D. Del. 2001) (rejecting request to modify confirmed plan  
 9 despite changed circumstances in view of creditor’s lack of standing); *In re Vencor, Inc.*, 284 B.R.  
 10 79, 85 (Bankr. D. Del. 2001) (denying creditor relief from provisions of confirmed plan deemed  
 11 tantamount to request for plan modification based on limitations of Section 1127(b)). Courts have  
 12 likewise refused to grant other remedies that would effectively circumvent the strict requirements of  
 13 Section 1127. *See In re Rickel & Associates, Inc.*, 260 B.R. 673, 678-79 (Bankr. S.D.N.Y. 2001)  
 14 (neither rules governing relief from judgment or order nor bankruptcy court’s general equitable  
 15 powers can be invoked to bypass Section 1127 restrictions regarding modification of confirmed  
 16 plan; court cannot modify substantially consummated plan, even at proponents’ request, based on  
 17 changed circumstances); *In re Logan Place Properties, Ltd.*, 327 B.R. 811, 813-14 (Bankr. S.D.  
 18 Tex 2005) (Section 1127(b) precludes court from modifying confirmed plan despite alleged mutual  
 19 mistake underlying plan); *In re Castle Industries, Inc.*, 147 B.R. 941, 945 (Bankr. E.D. Ark. 1992)  
 20 (dismissing complaint effectively seeking to rewrite terms of debtor’s confirmed plan based on  
 21 Section 1127(b) limitations).

22       Second, it is beyond dispute that the Plan was “substantially consummated” long ago.  
 23

24       <sup>7</sup> *See also United States Trustee v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators*  
 25 *of Utah, Inc.*), 150 F.3d 1233, 1238 (10th Cir. 1998); *Holstein v. Brill*, 987 F.2d 1268, 1270 (7th  
 26 Cir. 1993); *In re Diamond Mortg. Corp. of Illinois*, 105 B.R. 876, 880 (Bankr. N.D. Ill. 1989)  
 27 (“Confirmation of a plan in effect sets the plan in stone unless the proponent chooses to alter it  
 before it is substantially consummated.”); *Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX,*  
*Inc.)*, 853 F.2d 1149, 1158 n.13 (4th Cir. 1988).

28       <sup>8</sup> The Plan defines “PG&E Proponents” as “the Debtor and the Parent,” *i.e.*, Pacific Gas and  
 Electric Company and PG&E Corporation. Plan § 1.1 (McAllen Decl., Ex. H).

1 Bankruptcy Code Section 1101(2) defines substantial consummation as: (i) transfer of substantially  
 2 all of the property proposed under the plan; (ii) assumption by the debtor of the business or  
 3 management of substantially all of the property dealt with by the plan; and (iii) commencement of  
 4 distributions under the plan. 11 U.S.C. §1101(2). The effective date of the Plan of Reorganization  
 5 was April 12, 2004, at which point, each of these conditions were met. Notice of Effective Date  
 6 (PG&E RJN, Ex. 5); Plan § 4.2(d) (distributions occur on effective date); § 7.6 (governance of  
 7 debtor after effective date); § 9.2 (revesting of assets to debtor on effective date); § 9.3 (providing  
 8 for the operation of the reorganized debtor after the effective date). *See also* Post-Confirmation  
 9 Report (PG&E RJN, Ex. 7).

10 Accordingly, Grant may not seek to modify the substantially consummated Plan pursuant to  
 11 Section 1127(b). And, because withdrawal of the reference in order to transfer the Grant Claim to  
 12 the Washington Action would effectively rewrite provisions of the Plan, Grant may not circumvent  
 13 the Plan in order to achieve the same relief by this Motion. Regardless of any alleged change in  
 14 circumstances or how Grant's request is couched, the Motion should be denied on this ground  
 15 alone.

16 In light of this absolute bar to the relief requested, the Court need not reach the remaining  
 17 arguments tendered by Grant's Motion. In any event, none of those additional arguments would  
 18 support the relief Grant seeks.

19 **B. Grant County Fails to Meet the Legal Standards for Withdrawal of the  
 20 Reference.**

21 Even if the Plan could be amended, Grant has failed to meet its burden of demonstrating  
 22 cause for discretionary withdrawal of the reference. *See In re U.S. Airways Group, Inc.*, 296 B.R.  
 23 673, 677 (E.D. Va. 2003) (burden of demonstrating cause for withdrawal is on the movant); *Hatzel*  
 24 & *Buehler, Inc. v. Central Hudson Gas & Elec. Corp.*, 106 B.R. 367, 370 (D. Del 1989) (same).  
 25 That burden is a substantial one; withdrawal is permitted only on a showing of exceptional  
 26 circumstances and overriding interests. *United States v. Kaplan*, 146 B.R. 500 (D. Mass 1992); *see also*  
 27 *In Re Onyx Motor Car Corp.*, 116 B.R. 89, 91 (S.D. Ohio 1990) (motion for withdrawal of  
 28 reference not well received absent exceptional and compelling circumstances); *In re DeLorean*

1 *Motor Co.*, 49 B.R. 900, 912 (E.D. Mich. 1985) (overriding interest must be shown to overcome  
 2 presumption that Congress intended to have bankruptcy proceedings adjudicated in bankruptcy  
 3 court). In addition, none of the factors to be considered by the Court—including, (i) the efficient  
 4 use of judicial resources; (ii) the delay and costs to the parties; (iii) uniformity of bankruptcy  
 5 administration; (iv) the prevention of forum shopping; and (v) other related factors—tip the scales  
 6 in favor of withdrawal of the reference. *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999,  
 7 1008 (9th Cir. 1997).

8                   **1.       Efficiency Counsels Against Withdrawal of Grant's Claim.**

9                   Grant's primary argument—that judicial efficiency supports withdrawal—is patently wrong.  
 10                  the Grant Claim is, by its own admission, a “core” proceeding (MPA at 17), pursuant to 28 U.S.C.  
 11                  § 157(b)(2)(B), since it involves the allowance or disallowance of a claim against PG&E’s  
 12                  bankruptcy estate. This is central to the determination of whether withdrawal of the reference is  
 13                  efficient.

14                  Core proceedings go to the heart of the bankruptcy court’s authority. 28 U.S.C. § 157(b)(2);  
 15                  *In re Harris Pine Mills*, 44 F.3d 1431, 1436 (9th Cir. 1995); *In re Orion Pictures Corp.*, 4 F.3d  
 16                  1095, 1101 (2d Cir. 1993) (“A district court considering whether to withdraw the reference should  
 17                  first evaluate whether the claim is core or non-core, since it is upon this issue that questions of  
 18                  efficiency and uniformity will turn.”); *In re Sun West Distributors, Inc.*, 69 B.R. 861, 863 (S.D. Cal.  
 19                  1987). A bankruptcy court may hear and make final determinations on core claims—by definition,  
 20                  an efficient procedure for resolving such claims. 28 U.S.C. § 157(b)(1).

21                  In contrast, non-core proceedings relate only *peripherally* to the bankruptcy case. *See* 28  
 22                  U.S.C. § 157(b)(3). Findings made by a bankruptcy court in non-core proceedings are subject to an  
 23                  inefficient two-tiered layer of review; they must be reviewed by the district court (under a de novo  
 24                  standard if there are timely objections) before they become final. *Id.*; 28 U.S.C. §§ 157(b)(1),  
 25                  157(c)(1), (e); *In re Harris Pine Mills*, 44 F.3d at 1436. Moreover, a bankruptcy court cannot  
 26                  conduct jury trials in non-core proceedings unless the parties have consented thereto. *See, e.g.*, *In*  
 27                  *re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990). As a result, the bankruptcy courts’  
 28

1 handling of non-core proceedings carries with it inherent inefficiencies.<sup>9</sup> Because the same is not  
 2 true with respect to core proceedings—like the adjudication of the Grant Claim—Grant must point  
 3 elsewhere to show that withdrawal of the reference is inefficient. It fails to do so.

4 If an argument is to be made for efficiency, in fact, it counsels for denying this Motion and  
 5 leaving the Grant Claim with FERC, precisely as the Plan requires. The Class 6 Claims in PG&E's  
 6 bankruptcy—which include the Grant Claim—are not simple, stand-alone claims that could be  
 7 easily carved out and transferred to another venue, as Grant would suggest. Rather, they arise out  
 8 of complex, intertwined transactions made in a highly regulated market pursuant to complicated  
 9 tariffs. When a seller like Grant sold power into the ISO market, that power was combined with  
 10 power from other sellers and delivered to any number of market buyers that needed it. Thus, a  
 11 single power sale at the root of a Class 6 Claim might have involved any number of market buyers,  
 12 not just PG&E.<sup>10</sup>

13 So far, FERC and the ISO have spent over three years untangling these transactions to  
 14 determine who owes what to whom. FERC's expertise and intimate familiarity with these claims  
 15 amply justified the Bankruptcy Court's decision to have FERC liquidate them. *See United States v.*  
 16 *Star Route Box 1328*, 137 B.R. 802, 806 (Bankr. D. Or. 1992) (expertise of court handling claims is  
 17 factor to consider in deciding motion to withdraw); *Oliner v. Kontrabecki*, 2006 U.S. Dist. LEXIS  
 18 93190, at \*11 (N.D. Cal. Dec. 12, 2006) (familiarity of court with facts weighed in favor of denying  
 19 motion to withdraw); *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F. Supp.  
 20 2d 1111, 1121 (E.D. Cal. 2001) (noting that FERC has special expertise concerning the ISO Tariff  
 21 and that, barring an emergency, courts should allow FERC to act first on tariffs).

22 *Bonneville* does nothing to remove the Grant Claim from this complex mass of millions of  
 23

---

24 <sup>9</sup> Indeed, Grant cites key cases in which the decision to withdraw the reference was strongly  
 25 impacted by a finding that the proceedings at issue were non-core, without acknowledging this key  
 26 point. In *Security Farms*, for example, the court found a motion for withdrawal appropriate  
 27 because, “[i]n this case efficiency was enhanced by withdrawing the reference *because non-core*  
 28 *issues predominate.*” *Security Farms*, 124 F.3d at 1008 (emphasis added).

<sup>10</sup> See Proof of Claim, Attachment A at 1 (McAllen Decl., Ex. G) (admitting that, with  
 respect to its ISO sales, Grant “does not know who the obligor is”).

1 intertwined transactions. As discussed in Section III.E. above, *Bonneville* did not alter FERC's  
 2 finding that Grant's OOM sales are governed by the terms and conditions of the ISO Tariff, nor did  
 3 it divest FERC of authority to determine the amounts properly due under that Tariff. *Bonneville*  
 4 simply stands for the proposition that only a court can enforce FERC's ultimate refund  
 5 determinations against governmental sellers, like Grant. The efficiency considerations that led the  
 6 Bankruptcy Court to refer the Grant Claim along with the other Class 6 Claims to FERC in the first  
 7 place still apply with full force today.

8 Grant asserts that courts frequently withdraw the reference where another pending action  
 9 involves common issues of fact and law, in order to avoid the risk of inconsistent decisions. MPA  
 10 at 13. But Grant fails to connect the dots on this point. A risk of inconsistent decisions exists in  
 11 cases where the proceedings involve different parties. In such a scenario, parties to the non-  
 12 bankruptcy proceedings may freely relitigate the issues resolved by the bankruptcy court, leaving  
 13 open the possibility of conflicting rulings. *Bank Midwest, N.A. v. Cyberco Holdings, Inc.* 2005 U.S.  
 14 Dist. LEXIS 25834, at \*14 n.1 (W.D. Mich. Oct. 20, 2005). The key cases cited by Grant involve  
 15 precisely this scenario.<sup>11</sup> When such parallel cases involving different parties exist, withdrawal of  
 16 the reference can be both sensible and efficient.

17 But, contrary to Grant's assertions, withdrawing the reference with respect to the Grant  
 18 Claim not only fails to eliminate, but would enhance, any such risk. The FERC Refund  
 19 Proceedings involve every single party Grant means to haul into court in the Washington Action—  
 20 PG&E, SCE, SDG&E, and the ISO—as well as other ISO market participants. FERC is calculating  
 21 the prices that should have prevailed in the markets for *all* of these parties because it has a statutory  
 22 obligation to ensure that sellers charged only just and reasonable rates. Withdrawing the reference  
 23 regarding the Grant Claim would not make the FERC Refund Proceedings go away, or somehow  
 24 moot one of the other venues in which it is being decided. Instead, withdrawal of the reference of  
 25 the Grant Claim would result in inefficiencies, producing yet another piece of entirely duplicative  
 26

27 <sup>11</sup> See, e.g., *Big Rivers Electric Corp. v. Green River Coal Co., Inc.*, 182 B.R. 751 (W.D.  
 28 Ky. 1995); *In re Sevko, Inc.*, 143 B.R. 114 (N.D. Ill. 1992); *In re Wedtech Corp.*, 81 B.R. 237  
 (S.D.N.Y. 1987); *In re Enviro-Scope Corp.*, 57 B.R. 1005 (E.D. Pa. 1985).

1 litigation in yet another forum.

2 **2. Grant Offers No Other Justification to Support Withdrawal**

3 Not only does Grant's efficiency argument fail, Grant does not provide the Court with any  
4 other legitimate justification for withdrawal of the reference.

5 **Delay and Costs to the Parties:** It is obvious that, if Grant is permitted to open up yet  
6 another litigation front against PG&E in addition to the existing FERC Refund Proceedings and the  
7 Los Angeles Action, the multiplicity of proceedings would greatly increase the delay in and  
8 escalate the costs of ultimately resolving the controversy between the parties.

9 **Uniform Administration of Bankruptcy Estate:** Grant admits that withdrawal would  
10 have no positive effect on uniform administration of the bankruptcy estate. MPA at 15. But, in  
11 fact, separating the Grant Claim from the other Class 6 Claims and having it adjudicated separately  
12 in the Washington Action, while the dozens of other similarly situated claims are being liquidated  
13 through the FERC Refund Proceedings, actually undermines the uniform administration of PG&E's  
14 bankruptcy estate. Thus, this factor weighs against withdrawal of the reference.

15 **Forum Shopping:** Similarly, the fact that Grant is forum shopping weighs affirmatively  
16 against withdrawal of the reference. *See Security Farms*, 124 F.3d at 1008. This motion is a thinly  
17 disguised attempt by Grant to obtain a new forum so that it can avoid FERC's Orders that have  
18 been adverse to its interests and instead seek the full original price for its OOM sales. If its claim  
19 were left with the Bankruptcy Court, and thus liquidated by FERC, Grant would not receive the full  
20 original price, but rather a mitigated price calculated by FERC, for its OOM sales. Such forum  
21 shopping should not be permitted.<sup>12</sup>

22 In sum, withdrawal of the reference would be inefficient, increase costs, disrupt the uniform

---

23 <sup>12</sup> Grant will no doubt argue that PG&E is forum shopping by filing a lawsuit in the Los  
24 Angeles Superior Court. But a party that is forced into a new forum cannot reasonably be accused  
25 of forum shopping. PG&E sought to pursue its refund claims at FERC until *Bonneville* held that  
26 PG&E *must* sue in court to enforce the refund calculations as a matter of contract. *Bonneville*, 422  
27 F.3d at 925-926. Having no other option, PG&E then sued in *California*, in a court that is proper  
28 under the forum-selection clauses in the ISO and PX Tariffs. ISO Tariff § 20.7 (PG&E RJN, Ex.  
2); PX Tariff § 19.6 (PG&E RJN, Ex. 3) (forum-selection clauses naming California as appropriate  
venue for lawsuits involving ISO and PX Tariffs). By contrast, Grant has not been forced out of  
any forum.

1 resolution of the Class 6 Claims, and encourage forum shopping. Because Grant has failed to  
 2 demonstrate cause for withdrawal of the reference, its motion should be denied.

3 **C. The Request to Transfer Venue to the Eastern District of Washington Should  
 4 Be Denied.**

5 If this Court withdraws the reference, Grant asks that its claim for payment against PG&E  
 6 be transferred to the Eastern District of Washington, where it may be consolidated with the  
 7 Washington Action. MPA at 18-22. Even if withdrawal is granted, such transfer should be denied  
 on account of the following factors.

8 **Contractual Forum Selection Clause Placing Venue in California:** The ISO Tariff  
 9 requires that any action relating to it be brought in a court in the State of California. The Tariff  
 10 provides:

11 Market Participants irrevocably consent that any legal action or proceeding arising under or  
 12 relating to this ISO Tariff to which the ISO ADR Procedures do not apply, shall be brought  
 13 in any court of the State of California or any federal court of the United States of America  
 14 located in the State of California. Market Participants irrevocably waive any objection that  
 15 they may have now or in the future to said courts in the State of California as the proper and  
 exclusive forum for any legal action or proceeding arising under or related to this ISO  
 Tariff.

16 ISO Tariff § 20.7 (PG&E RJN, Ex. 2). According to FERC's November 23, 2004 Order, Grant's  
 17 Claim is subject to the ISO Tariff. November 23, 2004 Order at ¶¶ 66-69 (Grant RJN, Ex. 6). That  
 18 Order is the operative relevant law, unless and until it is reversed by the Ninth Circuit. It may not  
 19 be reconsidered pursuant to Grant's collateral attack in this Court. *See City of Tacoma v. Taxpayers  
 20 of Tacoma*, 357 U.S. 320, 336 (1958) (federal courts of appeals have exclusive jurisdiction to hear  
 challenges to FERC orders).<sup>13</sup> As such, this Court may not disregard the contractual forum-  
 21 selection clause in the ISO Tariff. *Smith, Valentino, & Smith, Inc. v. Superior Court*, 17 Cal. 3d  
 22 491, 495-96 (1976) (enforcing contractual forum selection clause); *Lu v. Dryclean-U.S.A. of  
 23 California, Inc.*, 11 Cal. App. 4th 1490, 1493 (1992) (same).<sup>14</sup> Therefore, the Grant Claim—even if

25 <sup>13</sup> For this same reason, statements by Tim Culbertson, the General Manager of Grant, in  
 26 his declaration filed in support of Grant's motion suggesting that Grant's OOM sales were not  
 27 subject to the terms and conditions of the ISO Tariff should also be disregarded by this Court. *See*  
 Culbertson Decl. ¶¶ 7-15, 18-20 (Docket No. 8).

28 <sup>14</sup> A party seeking to defeat a contractual forum selection clause must demonstrate that  
 enforcement would be unreasonable under the circumstances. *Smith, Valentino, & Smith*, 17 Cal.

1 the reference is withdrawn—may not be transferred to the Washington District Court.

2 Aside from the contractual forum-selection clause, Grant does not prove by a preponderance  
 3 of the evidence—as it must—that the initial venue in this case should be disturbed. There is a  
 4 “strong presumption” in favor of maintaining venue where the bankruptcy is pending. *In re TIG*  
 5 *Ins. Co.*, 264 B.R. 661, 668 (Bankr. C.D. Cal. 2001); *In re Onco Invest. Co.*, 320 B.R. 577, 579  
 6 (Bankr. D. Del. 2005).<sup>15</sup> As discussed below, neither the “interests of justice” nor the “convenience  
 7 of the parties”—the primary factors considered by courts—favor transfer. *In re TIG*, 264 B.R. at  
 8 669; *In re Onco Invest.*, 320 B.R. at 579; 10 *Collier on Bankruptcy* ¶ 7087.02 (15th ed. rev. 2003)  
 9 (movant has the burden of proving that transfer would be in the interests of justice or for the  
 10 convenience of the parties).

11 **Interests of Justice:** Grant contends that the “interests of justices” are better served by  
 12 transfer, since litigation in Eastern District of Washington would be more efficient than that in the  
 13 Bankruptcy Court. MPA at 20-21. But the Washington Action has been stayed for over three  
 14 years. Although the stay has recently been lifted, the defendants in that action have yet even to  
 15 appear and respond to the complaint. In contrast, the Bankruptcy Court has already confirmed the  
 16 Plan and referred the Grant Claim and the other Class 6 Claims to FERC for liquidation. FERC is  
 17 and has been liquidating those claims; it is untangling the complex transactions in the PX and ISO  
 18 markets, including Grant’s OOM sales, and determining what was delivered to whom and when,  
 19 and what the just and reasonable price for each of those sales should be. All of the relevant  
 20 parties—including Grant, the ISO, PG&E, SCE, SDG&E, and other market buyers to whom power  
 21 from Grant may have been delivered—are participants in that process. That process will continue  
 22 regardless of whether or not the Grant Claim is transferred to the Eastern District of Washington.  
 23 Accordingly, no judicial economy or efficiency would be achieved by the requested transfer.

---

24 3d at 495-96. A clause is not unreasonable even where a party has not signed the agreement  
 25 containing the clause or when enforcement would cause inconvenience or additional expense. *Id.*  
 26 *See also Lu*, 11 Cal. App. 4th at 1493.

27 <sup>15</sup> Grant suggests that this presumption is weakened here because the bankruptcy  
 28 proceeding is post-confirmation. MPA at 21. That is not true. Because, as discussed above,  
 withdrawal of the reference of the Grant Claim will disrupt the uniform administration of the Class  
 6 Claims and, thus, PG&E’s bankruptcy estate, this presumption is still warranted.

1        This conclusion is in no way undermined by the fact that PG&E has filed suit in Los  
 2 Angeles Superior Court against Grant and other governmental sellers. PG&E initiated the Los  
 3 Angeles Action because a court (rather than FERC) is the only forum in which PG&E (along with  
 4 the other Utilities) may enforce its contract remedies against Grant and the other governmental  
 5 sellers. MPA at 21. Although FERC may re-set the prices at which governmental sellers sold  
 6 power to the Utilities pursuant to the PX and ISO Tariffs, FERC lacks the authority to compel them  
 7 to refund any overcharges to the Utilities. *Bonneville*, 422 F. 3d at 911. Since PG&E cannot obtain  
 8 final relief against Grant from FERC, it must seek that relief from a court.

9        Other factors also indicate that the “interests of justice” weigh against transfer from the  
 10 California Bankruptcy Court to the Eastern District of Washington. The California courts have a  
 11 unusually strong interest in resolving this dispute. The Grant Claim arises from sales of high-priced  
 12 electricity into California’s markets during the height of the California Energy Crisis. To the extent  
 13 PG&E is successful in litigating the Grant Claim, that success will redound to the benefit of  
 14 PG&E’s customers: California residents and businesses. This dispute accordingly presents matters  
 15 of enormous public interest to the people of California. Moreover, the ISO Tariff—which governs  
 16 Grant’s OOM sales—is governed by and construed in accordance with California law. ISO Tariff  
 17 § 20.7 (PG&E RJN, Ex. 2). The Grant Claim for payment for its OOM sales will therefore be  
 18 evaluated under California, not Washington, law. *See McGill v. Hill*, 644 P.2d 680, 683-84 (Wash.  
 19 Ct. App. Div. 1 1982) (giving effect to express choice-of-law clause in contract). *See also*  
 20 Restatement (Second) of Conflicts of Laws § 187 (1971).

21        **Convenience of the Parties:** Nor does the convenience of the parties tip the scales in favor  
 22 of transfer. Transfer from this Court to the Eastern District of Washington is a zero sum game; it  
 23 would simply shift the costs and inconvenience of litigating out-of-state case from Grant to PG&E.  
 24 Such circumstances do not justify transfer. *In re Am. Int’l Airways, Inc.*, 66 B.R. 642, 644 (Bankr.  
 25 E.D. Pa. 1986) (“Where a transfer would merely shift the inconvenience from one party to the other  
 26 . . . [the] choice of forum should not be disturbed.”). To meet its burden with respect to this factor,  
 27 Grant must establish by a preponderance of the evidence that the balance of convenience weighs  
 28 clearly and substantially in favor of the proposed transfer. *Id.* *See also In re Windsor Comm.*

1 *Group, Inc.*, 53 B.R. 293, 296 (Bankr. E.D. Pa. 1985); *In re Holmes*, 306 B.R. 11, 17-18 (Bankr. 2 M.D. Ga. 2004). It cannot do so.<sup>16</sup> Indeed, Grant admits as much when it states that the Eastern 3 District of Washington would be “at least as convenient” as this Court. Grant’s request for a 4 transfer should be denied.

5 **V. CONCLUSION**

6 For the reasons stated above, Grant’s motion for withdrawal of the reference and transfer of 7 its claim should be denied.

8 DATED: August 24, 2007

9 Respectfully submitted,

10 HOWARD RICE NEMEROVSKI CANADY FALK &  
11 RABKIN  
12 A Professional Corporation

13 HELLER EHRLMAN LLP

14 By /s/ Marie Fiala  
15 Marie Fiala

16 Attorneys for Defendant  
17 PACIFIC GAS & ELECTRIC CO.

22 \_\_\_\_\_  
23 <sup>16</sup> Grant’s general allegation that “all of [its] evidence and witnesses relevant to this dispute  
24 are located in Ephrata, Washington” (MPA at 22) is insufficient to establish an inconvenience  
25 justifying transfer. Grant has not shown that the evidence could not be easily copied and  
26 transported nor has it identified specific key witnesses, indicated what their testimony would be, or  
27 shown that any of its witnesses would be particularly inconvenienced by appearing before this  
28 Court. Absent such specificity, a motion to transfer may not be granted. *In re Holmes*, 306 B.R. at  
17-18 (denying motion for transfer to New York where defendant merely alleged that most  
witnesses resided there and failed to show that the records at issued could not be copied or easily  
transported); *In re Onco Invest.*, 320 B.R. at 580. *See also* 15 C. Wright, A. Miller, & E. Cooper,  
*Fed. Prac. & Proc.* §§ 3851 and 3853 (2d ed. 1986 & Supp. 2003).